Page Litho, Inc., Debtor-in-Possession *and* Graphic Communications International Union, Local 289, AFL–CIO. Case 7–CA–33921

March 2, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

Upon a charge filed by the Graphic Communications International Union, Local 289, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on December 16, 1992, an amendment to complaint on March 19, 1993, and a second amendment to complaint on August 9, 1993, against Page Litho, Inc., Debtor-in-Possession (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer to the complaint and a second amended answer to the complaint.

On August 23, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On August 30, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Union and the General Counsel filed briefs in support of the motion. The Respondent filed a brief opposing the General Counsel's request for a make-whole remedy.

Ruling on Motion for Summary Judgment

The Respondent was advised by the General Counsel that by operation of Section 102.20 of the Board's Rules and Regulations, ''any allegation in the complaint not specifically denied or explained in an answer . . . shall be deemed to be admitted to be true . . . .'' In its second amended answer to complaint, the Respondent admitted or pleaded ''no contest'' to the complaint allegations, but reserved the right to contest the issue of the appropriate remedy. Therefore, by its second amended answer to complaint, the Respondent has admitted there is no dispute with regard to any relevant and material facts pertinent to establishing the violations alleged in the complaint. Accordingly, all the allegations in the complaint will be considered admitted to be true, and we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Detroit, Michigan, is engaged in the printing and bindery business. During the calendar year ending December 31, 1991, the Respondent sold and shipped from its Detroit, Michigan facility goods valued in excess of $50,000 directly to points outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (unit 1) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing work processes, operations and products associated with or related to Lithography, offset (including dry or wet) photoengraving, intaglio and gravure including any technological or other change, evolution of or substitution for any work, process, operation or product now or hereinafter utilized in any of the methods described above employed by the Respondent at its Detroit, Michigan facility, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

The following employees of the Respondent (unit 2) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All bindery workers, head shipping and receiving clerks, shipping and receiving clerks, miscellaneous shipping and stock handling employees, building maintenance employees, truck drivers and hand and table workers employed by the Respondent at its Detroit, Michigan facility, but excluding office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

Since prior to 1980, based on Section 9(a) of the Act, the Union has been the designated collective-bargaining representative of the unit 1 employees and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 1, 1986, to May 31, 1989.

Since prior to l980 until on or about October 1, 1990, Graphic Communications International Union, Local 20-B, AFL–CIO (Local 20-B) was the designated exclusive collective-bargaining representative of the unit 2 employees and had been recognized as the representative by the Respondent. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 28, 1986, through July 30, 1989. Effective

on or about October 1, 1990, Local 20-B was merged into the Union and thereafter ceased to exist. Since on or about October 1, 1990, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit 2 employees.

The 1986–1989 collective-bargaining agreement between the Respondent and the Union, covering the unit 1 employees, contained the following provision:

> ARTICLE 7: HIRING
>
> *Section 1*. The employer agrees to inform the union of all position vacancies for work covered by this contract and to secure the necessary employees, if available, from the union. However, if help is unavailable, the employer shall have the right to hire help through other channels provided such hiring through other channels shall not be in conflict with any other provision of this agreement and the union is notified. The union agrees to refer applicants for available jobs in a nondiscriminatory manner.

The Respondent and the Union began negotiations for a new collective-bargaining agreement. On or about September 25, 1989, the Respondent implemented its ''final offer'' regarding the terms of a new agreement. This offer contained a revised article 7, as follows:

> ARTICLE 7: HIRING
>
> *Section 1*. The employer agrees to inform the union of all position vacancies for work covered by this contract and to give the union equal opportunity to refer qualified applicants. The employer shall have the right to hire help through other channels. The union agrees to refer applicants for available jobs in a nondiscriminatory manner.

The 1986–1989 collective-bargaining agreement between the Respondent and Local 20-B, covering the unit 2 employees, contained the following provision:

> *Section 23*. The employer in need of help in the plants or departments over which the union has jurisdiction as stated above shall notify the office of the union. However, an employer shall have the right to hire help through other channels provided such hiring through other channels shall not be in conflict with any other provision of this agreement. No person engaged in the performance of work within the jurisdiction of GCIU Local 20-B shall be paid less than the minimum hourly rates set forth herein for all hours worked.

There was no change to section 23 in the Respondent's September 25, 1989 final contract offer.

Since on or about June 30, l99l, and continuing to date, the Respondent has unilaterally changed terms and conditions of employment by failing to notify the Union of position vacancies for work within unit 1 and to give the Union equal opportunity to refer qualified applicants in accord with article 7 of the Respondent's final offer.

Since on or about February 2, 1991, and continuing to date, the Respondent has unilaterally changed terms and conditions of employment by failing to notify the Union when it was in need of additional employees for work within unit 2 in accord with section 23 of the Respondent's final offer.

Since on or about February 2, 1991, and continuing to date, the Respondent has unilaterally changed terms and conditions of employment regarding rates of pay to employees in units 1 and 2.

CONCLUSIONS OF LAW

1. By failing to notify the Union of position vacancies for work within unit 1 and to give the Union equal opportunity to refer qualified applicants in accord with article 7 of its September 25, 1989 final contract offer, the Respondent has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By failing to notify the Union when it was in need of additional employees for work within unit 2 in accord with section 23 of the final offer, the Respondent has violated Section 8(a)(5) and (l) and Section 2(6) and (7) of the Act.

3. By unilaterally changing terms and conditions of employment regarding rates of pay to employees in units 1 and 2, the Respondent has violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make its employees in units 1 and 2 whole for any loss of pay they may have suffered as a result of the Respondent's unilateral change in terms and conditions of employment regarding rates of pay. Such amounts are to be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel requests that the Board order a make-whole remedy for all employees who, according to the General Counsel, would have been hired by the Respondent but for its failure to notify the Union of job openings. We deny this request for the following reasons.

The final contract offer the Respondent implemented on September 25, 1989, provided for a *nonexclusive* hiring hall which required the Respondent only to *no-*

tify the Union of job openings. The Respondent had no obligation to hire any individual referred by the Union. In fact, the Respondent had the explicit right ''to hire help through other channels.''

Furthermore, there is no allegation that the Respondent acted discriminatorily in its hiring during the time at issue. In this respect, the remedial issue presented here is analogous to the one the Board considered in *Taracorp, Inc*., 273 NLRB 221, 222–224 (1984). The Board held in *Taracorp* that the employer's violation of an employee's *Weingarten*[1] rights did not automatically entitle the employee to reinstatement where there was not a sufficient nexus between the unfair labor practice—denial of representation at an investigatory interview—and the reason for the employee's discharge—perceived misconduct. In the instant case, we are unable to justify the imposition of the remedy the General Counsel requests where the Respondent's only violation was its failure, pursuant to a nonexclusive hiring hall arrangement, to notify the Union of job openings. Here, as in *Taracorp*, there is not a sufficient nexus between the violation committed—failure to notify—and the failure of particular individuals to be hired, where the Respondent had no obligation to hire them in the first place and the Respondent committed no discrimination in its hiring.

The cases cited by the General Counsel do not support a make-whole remedy under the circumstances herein.

The General Counsel claims that in *Development Consultants*, 300 NLRB 479 (1990), the Board ''found a make-whole remedy to be appropriate in order to remedy a violation of the Act involving a nonexclusive hiring hall.'' However, the Board specifically found that the union *discriminatorily* refused to refer members and ordered a make-whole remedy to cure that discrimination. There is no allegation of discrimination in the instant case.

Despite the absence of discrimination and an exclusive hiring hall, the General Counsel asserts that individuals who would have been referred should be offered employment and made whole by the Respondent because they are easily identified. This is appropriate, according to the General Counsel, because the Respondent has created, by its unfair labor practices, uncertainty as to whether the identifiable pool of employees would have been hired. The General Counsel relies on *State Distributing Co*., 282 NLRB 1048 (1987), and *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981).

The General Counsel is mistaken in asserting that the cited cases support the proposition that the violation in this case justifies assuming that individuals the Union would have referred would have been hired by the Respondent. In the cases cited, the Board found that the respondents *discriminatorily* refused to hire their predecessors' employees in order to avoid work forces with a union majority. It was the respondents' *discriminatory* acts that created the uncertainty whether the predecessors' employees would have applied and been hired. The Board accordingly resolved that uncertainty against the respondents and therefore found that the unions' majority status presumptively would have continued. In the instant case, there are no discriminatory acts or any acts equivalent to discrimination.

The General Counsel also likens this case to *Allied Products Corp*., 218 NLRB 1246 (1975), enfd. in pertinent part 548 F.2d 644 (6th Cir. 1977), in which the Board included in its order a make-whole provision in furtherance of the status quo ante remedy for the respondent's 8(a)(5) unilateral change in employees' existing benefits. However, *Allied Products* does not support the General Counsel's position because the unilateral change at issue here, failure to notify, does not involve a change in wages or other terms for which a make-whole provision would be appropriate. Restoration of the status quo ante in the instant case merely requires the Respondent to notify the Union of job openings.

Finally, the General Counsel relies on cases imposing the remedy set forth in *Rubber Workers Local 250 (Mack-Wayne Closures)*, 279 NLRB 1074 (1986), and 290 NLRB 817 (1988). We believe there is a critical distinction between those cases and the instant case.

As the General Counsel points out, in those cases the Board ordered that a union, which violated Section 8(b)(l)(A) of the Act by refusing to process an employee's grievance pertaining to his discharge, make whole the employee for any loss of pay suffered as a result of the unfair labor practice. Before such a remedy could be ordered, however, the Board ''required an affirmative showing of a nexus between the unfair labor practice and the make-whole remedy.'' 290 NLRB at 818. The Board defined that nexus as a showing that the employee's grievance was not clearly frivolous.

In the instant case, we cannot make the finding that was preliminary to the remedy imposed in *Mack-Wayne*, supra. Given that the General Counsel has conceded that the Respondent had no obligation to hire anyone the Union might have referred and that there was no discrimination in the Respondent's actual hirings, there simply is no nexus between the unfair labor practice and the failure of individuals to be employed by the Respondent.

In sum, a make-whole order must remedy actual and not speculative damages. *Sure Tan, Inc. v NLRB*, 467 U.S. 883, 900 (1984). The stipulated facts provide no basis for finding the actual damages that would justify imposing the remedy the General Counsel seeks. To impose a make-whole remedy in this case is ''to take

[1] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

action that simply does not lie within the Board's [10(c)] powers.'' *Sure Tan*, 467 U.S. at 900 and 904 fn. 13.

Accordingly, we shall require only that the Respondent meet the obligation it imposed on itself by implementing the final contract offer to notify the Union when there are position vacancies for work within unit 1 and when the Respondent is in need of additional employees for work within unit 2.

ORDER

The National Labor Relations Board orders that the Respondent, Page Litho, Inc., Debtor-in-Possession, Detroit, Michigan, its officers, agents, successors, and assigns, shall

l. Cease and desist from

(a) Failing to notify Graphic Communications International Union, Local 289, AFL–CIO of position vacancies for work within unit 1 and to give the Union equal opportunity to refer qualified applicants, in accord with article 7 of its September 25, 1989 final contract offer.

(b) Failing to notify the Union when it was in need of additional employees for work within unit 2 in accord with section 23 of its final offer.

(c) Unilaterally changing terms and conditions of employment regarding rates of pay to employees in units 1 and 2.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees in units 1 and 2 for any loss of pay as a result of its unilateral change in terms and conditions of employment regarding rates of pay, with interest, in the manner set forth in the remedy section of the decision.

(b) Notify the Union of position vacancies for work within unit 1 and notify the Union when it is in need of additional employees for work within unit 2.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(d) Post at its facility in Detroit, Michigan, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to notify Graphic Communications International Union, Local 289, AFL–CIO of position vacancies for work within unit 1 and to give the Union equal opportunity to refer qualified applicants in accord with article 7 of our September 25, 1989 final contract offer.

WE WILL NOT fail to notify the Union when we are in need of additional employees for work within unit 2, in accord with section 23 of our final offer.

WE WILL NOT unilaterally change terms and conditions of employment regarding rates of pay to employees in units 1 and 2.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole employees in units 1 and 2 for any loss of pay as a result of our unilateral change in terms and conditions of employment regarding rates of pay, with interest.

WE WILL notify the Union of position vacancies for work within unit 1 and WE WILL notify the Union when we are in need of additional employees for work within unit 2.

PAGE LITHO, INC., DEBTOR-IN-POSSESSION

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''